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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As this Reply Brief will show, the Respondent's Brief misrepresents facts, misrepresents the record, and misrepresents the Veterans' case. This misrepresentation is crucial, because, as Respondents claim, this case turns on the facts. Resp. Br. 2. What the facts describe is a conflict between two sides: a longstanding private group that runs a parade, and a newly-formed group that has lately sought to use that parade to make its own statement.

As such, this is a case primarily about the First Amendment, as indeed the Veterans have argued from the beginning. As private actors, the Veterans have a First Amendment right to express anything they wish, without being forced by the government to express anything they do not.

GLIB has absolutely no claim on the Veterans' Parade since it could sponsor another parade at any other time, or on any other street in the City of Boston. In other words, it can have its own parade and offer its own message. The fact that GLIB has been largely successful in its state-compelled intrusions into the Veterans' Parade should concern all private sponsors of speech conducted in a public forum.

For forty-seven years, the Allied War Veterans Council of South Boston has organized and run a hugely popular but distinctly private parade in the neighborhood of South Boston. This is the Veterans' annual celebration commemorating St. Patrick, the Patron Saint of Ireland and the Archdiocese of Boston, and the British Evacuation of Boston in 1776.[1]

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[1] Evacuation Day is a limited Public Holiday, celebrated only in Suffolk County, Massachusetts. While the Respondent's Brief characterizes it as "a civic holiday centered on a municipal parade," (Resp. Br. 4), the city does not conduct any Evacuation Day activities, with the exception of allowing a day off for municipal employees. The Respondent does concede that "March 17, of course, also happens to be St. Patrick's Day." (Resp. Br. 3). Interestingly, Author Thomas O'Connor, Professor of History at Boston College, quoted in a Boston Globe article by Tom Coakley, Globe Staff, March 17, 1995: *Evolution of a holiday, Boston-style*, tells a different story of how the holiday evolved. Giving workers a day off for St. Patrick's Day would have violated church-state separation and the sensibilities of the Yankee establishment, he said. Therefore, "at a time where it would have been impossible to get a holiday to celebrate a Catholic saint, the way around it was to get a holiday for Evacuation Day. It was a political disguise." During the middle of the nineteenth century, an era when the Know-Nothing movement gained ascendancy in this country, Irish Catholics were openly prohibited from taking part in July 4th parades. In response, they formed their own parades, thus giving rise to thousands of annual St. Patrick's Day parades conducted throughout the nation. *See* Thomas Sowell, *Ethnic America*, Introduction and Chapter 1, "The Irish."

I. Respondent's Assertion That the Veterans Are Merely Administering a Parade For the City Is Erroneous.

The central facts regarding parade ownership are resolved by the findings of the trial court, which the Supreme Judicial Court affirmed: (1) that the city's involvement in the Parade did not amount to state action; and (2) that the Veterans are private actors (Cert. Pet. App. B22).

Respondent apparently accepts these findings, but nonetheless insists on the fiction that the Veterans are merely administering the Parade on the city's behalf. "The Parade was once formally under the City of Boston's management." (Resp. Br. 4). "The Parade belongs, and has always belonged, to all citizens of Boston." (Resp. Br. 20). "[T]he City conducted [the Parade] for years and . . . the Council has more recently conducted [it.]" (Resp. Br. 31). "[T]he Council functions chiefly as the administrator of the event . . ." (Resp. Br. 32).

Respondent attempts to raise the state action issue through the back door (Resp. Br. 21-22 n.17), despite the fact that the law of the case foreciosed this issue. Not only did Respondent fully litigate this matter at trial, but the trial judge found against GLIB on state action. When the Veterans appealed the case to the Massachusetts Supreme Judicial Court, Respondent's brief, dated March 2, 1994, stated that the "Court should deny the Veterans Council appeal and affirm in all respects the ruling of the trial Court below." (Appellees' Brief at 35). When GLIB broached the issue of state action in its Reply Brief to the Supreme Judicial Court, the Court summarily rejected it. *Irish American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston*, 418 Mass 238, 245 n.12, 636 N.E. 2d 1293, 1297 n.12 (1994). Nor was it among the Questions Presented in the Petition for Certiorari in this case.

In any event, the major difficulty with Respondent's misleading argument is that it is carried on the shoulders of apoc-

rypha and anecdote. The city's position regarding parades was described by Assistant Corporation Counsel McKelway at trial: "The City is not in the business of running parades and there will be testimony that, of the approximately two hundred parade permits issued annually by the City, there is only one that the City actually runs and that is the Fourth of July Parade. It is not the St. Patrick's Day parade. The Veterans have run that parade for at least forty-seven, maybe forty-eight years now." (Tr. p. 38).

Additionally, city attorney McKelway read into the record of the trial the response of the Mayor of the City of Boston, Raymond Flynn, to an interrogatory submitted by Petitioners regarding ownership of the parade. The Mayor responded:

> To the best of my knowledge, the Allied War Veterans Council plans, organizes, administers, coordinates, promotes, publicizes, and executes the Evacuation Day/St. Patrick's Day Parade. The city's function in relation to the parade from 1990 to 1993, as with all other private parades, was to ensure that the event is properly permitted through the Department of Transportation and to engage in appropriate action to protect the public safety through the Police Department, Fire Department, Department of Health and Hospitals, and the Public Works Department.

Tr. 472-473.

The uncontroverted facts in this case are that the city of Boston issues between two hundred and two hundred and fifty parade permits each year to private groups in the city of Boston. Tr. 182. The permit issued to the Veterans is but one of many issued to private parties to celebrate various occasions.

GLIB had a full and fair opportunity to explore its unsupported assertion in the lower courts. City defendants were

available to substantiate or deny this belief, and to subject themselves to questioning under oath as to the truthfulness of their testimony. GLIB did not question the mayor, the licensing authority, the Veterans, nor the police department with regard to this point. We have no idea what Mayor Curley said almost a half century ago, or whether the city even issued permits during that period. He purportedly gave permission to the Veterans to run the Parade. However, today, when a group wishes to conduct a parade, an application for a permit must be made to the Boston Transportation Department. Tr. 183.

If there is an agreement between the city and the Veterans to have the Veterans administer this parade, no rationale for this venture has been offered by Respondent. Moreover, it is ludicrous to suggest that the Veterans would wage a costly three-and-a-half-year campaign to retain control of their Parade if they or the city had an agreement that the Veterans only administer this event on the city's behalf. Were that the case, it is far more likely the Veterans would simply have said to the city, "You run your parade and we'll run ours," or alternatively, the city would likely have said to the Veterans, "You are hereby disfranchised." It is that simple. It is utterly illogical to accept the Respondent's position, and there is no evidence in the record to suggest that the city of Boston and the Veterans engaged in a scheme to exclude GLIB from the Veterans' Parade.[2]

Lastly on this point, in the hope of showing a nexus, GLIB hopes to attach significance to the fact that March 17th is Evacuation Day, and that over the years the governor of the Commonwealth has issued a proclamation to honor the occa-

[2] As noted by Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 866-67 (1993), "It can scarcely be denied that the mayors in both cities [Boston and New York] have used their good offices in a genuine effort to bring ILGO and GLIB into the fold . . . I hesitate to say that . . . Ray Flynn . . . committed the very discriminatory actions [he] worked so hard to avert. I certainly would conclude that Dinkins and Flynn were

sion. Resp. Br. 10. A ceremonial Proclamation encouraging citizens to celebrate a particular holiday carries no force of law for the citizenry of Massachusetts. Moreover, in recent times the St. Patrick's Day Parade has been held on the Sunday closest to March 17th, and thus never on the public holiday that commemorates Evacuation Day. As the court ruled in *Gay Veterans Ass'n, Inc.* v. *American Legion*, 621 F. Supp. 1510, 1517 (S.D.N.Y. 1985):

> Plaintiffs argue that the American Legion Parade is a public forum because its purpose is to celebrate a public holiday, Veterans Day, on a public street. This, however, does not turn a private parade into a public forum. Under New York law, the sponsorship of parades to celebrate Veterans Day is not an exclusively public function.

The Petitioners are not custodians of a public celebration in any sense. They are not designees of the city, nor do they exercise their constitutional rights at the public's pleasure. Contrary to GLIB's assertion, and notwithstanding conclusory statements in Professor Yackle's law review article regarding detailed participation by the city,[3] the record simply does not support the claim that the city ever conducted or managed the St. Patrick's Day/Evacuation Day Parade.

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responsible for what happened in the practical sense that they failed to do all they might have to change the result. Yet, current state action doctrine would presumably find that argument insufficient."

[3] Professor Yackle is on the Respondent's Brief in this case. His law review article was submitted in draft form to the trial court at the end of the trial in this case along with GLIB's Proposed Findings of Fact and Conclusions of Law.

II. GLIB Has a Message. The Veterans Object Not to GLIB's Members' Sexual Orientation But to Their Message.

> The argument on this point may sound like double-talk on first hearing, but there is some substance to the claim that the exclusion of gay and lesbian *groups*, as opposed to individual homosexuals marching with other units, is not discrimination on the basis of sexual orientation at all, but rather is discrimination on the basis of the point of view that ILGO and GLIB represent. Those organizations do have a message of their own, namely the message that forms their raison d'etre. . . . [I]n this particular First Amendment context, where speech claims are set over against each other, it seems perfectly reasonable, even essential, that those who command the public forum be permitted to bar those with conflicting views.
>
> Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 851 (1993).

In its Brief, Respondent claims that "the message [GLIB] wish[es] to convey by participating in the Parade is simply the existence of gay men, lesbians, and bisexuals as part of the Irish-American community." Resp. Br. 30 n. 21. Respondent concedes that "GLIB . . . would have contributed a message if it had been allowed to participate." *Id.* at 32. However, there is no need to rely on hypothetical assurances of GLIB's communicative purpose. The simple fact is that GLIB did participate under its own banner in both the 1992 and 1993 Parades. The banner proclaimed and celebrated GLIB's pride in its dual heritage: "Irish-American Gay, Lesbian and Bisexual

Group of Boston" adorned with green shamrocks enclosing pink triangles. (J.A. A67; Ex. 84 videotape of 1993 Parade). GLIB had expressive purposes, as found by the trial judge. (Cert. Pet. App. at B3, C5.) It celebrated its "diversity," regardless of how that fit into the Veterans' celebration. It is a "diversity" that oddly enough seeks forced inclusion. Judge Flannery, equating GLIB's messages and values, *i.e.*, its viewpoint, with sexual orientation, ruled: "A proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness," (Cert. Pet. App. at B24), and that "Inclusiveness should be the hallmark of their Parade." *Id.* at B28.

The Respondent admitted through its lead counsel at trial: "We will also show that the thrust of the action by the Veterans and the city is not to make a determination of GLIB as an organization or to criticize GLIB. The thrust of this is to preclude GLIB's message from being heard either in Boston or elsewhere." (Tr. 26-7).

Still, GLIB contends that the Veterans merely have "to allow GLIB marchers to march while self-identifying as lesbians, gay men or bisexuals by means of a banner." Resp. Br. 28. As Nan D. Hunter, a lesbian scholar, wrote:

> The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representations of the self. Self-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out — to act on and live out that identity. Notions of identity increasingly form the basis for gay and lesbian equality claims. Those claims merge not only status and conduct, but also viewpoint, into one whole. To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol.

Identity, Speech and Equality, 79 VA. L. REV. 1695 (1993).[4]

Judge Flannery equated GLIB's message with the sexual orientation of its members. "GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation. Tr. of Closing Arg. at 43, 51-52 (Nov. 23, 1993)" (Cert. Pet. App. at B4 n. 5). As the transcript references in the trial court's opinion make clear, the Veterans freely admitted that they were discriminating against the messages and values of GLIB, *i.e.*, its viewpoint. But the equation of its message with its members' sexual orientation was an error of law. The trial judge stated: "Excluding all sexual themes not only contravenes the First Amendment prohibition on content-based restriction — but is a form of discrimination itself." *Id.* at B4 n. 6. This collapsing of the distinction between the message and the messenger is a critical error. For all the Veterans knew, and for all they cared, heterosexual members or sympathizers of GLIB could be marching behind GLIB's banner, since membership in GLIB depended on support for its goals. Tr. 98. Even if all the marchers behind GLIB's sign were "straight," however, the exclusion of the group would still legally be discrimination on the basis of sexual orientation, under the trial judge's reasoning.

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[4] From quite a different perspective, Oxford scholar John Finnis noted that "[t]he phrase 'sexual orientation' is radically equivocal. Particularly as used by promoters of 'gay rights,' the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct." Finnis continues: "It is also widely observed that laws or proposed laws outlawing 'discrimination based on sexual orientation' are always interpreted by 'gay rights' movements as going far beyond discrimination based merely on A's belief that B is sexually attracted to persons of the same sex. Instead (it is observed), 'gay rights' movements interpret the phrase as extending full legal protection to public activities intended specifically to promote . . . homosexual conduct." Law, Morality and "Sexual Orientation," 69 NOTRE DAME L. REV. 1049, 1053-54 (1994).

Respondent's Brief makes much of the Veterans' reasons for not allowing GLIB to march, reasons which the trial judge deemed pretextual. "Only when the 'sexual themes' rationalization collapsed as well, did the Council develop the First Amendment argument pressed here," (Resp. Br. at 13), implying that the First Amendment was simply a pretext for discrimination, lately developed by the Veterans. Professor Yackle's article, however, clearly recognized that the Veterans had relied early in 1992 principally upon the First Amendment in rejecting GLIB:

> [T]he Veterans declared that the 'principle' [*sic*] reason for excluding GLIB was that the inclusion of [GLIB] was 'not consistent' with the Veterans' own views, 'embodied in their parades'. . . . In this last, of course, the Veterans asserted their own First Amendment right to use the parade to advance a private agenda, and within that argument, effectively claimed that they need specify no particular message other than what was implicit in ad hoc decisions to include some groups and exclude others.

Yackle at 844.

Indeed, the Veterans' exclusion of sexual themes was nothing other than a First Amendment argument that they — not the government — should control the content of their own speech. Judge Flannery considered it pretextual, but his reasoning underlying that determination was clearly erroneous, since it was premised on a mistake of law: that a privately-organized event cannot exclude sexual themes consistent with the First Amendment. Cert. Pet. App. at B4 n.6. The trial judge had literally turned the First Amendment on its head.

The trial judge did the same with the Veterans' expressed concerns about the GLIB members' associations with ACT-UP

and Queer Nation (Tr. 316),[5] finding there was "no basis for concluding that GLIB's participation would incite imminent lawlessness," citing *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). As a private actor, the Veterans' Council did not have to meet the First Amendment's standards binding government, since the judge had found that there was no state action. Once again, the finding of pretext was based on an error of constitutional law. The Veterans' Council is the beneficiary of the First Amendment, and not its victim.

III. The Veterans Know What They Do Not Want to Say Through Their Parade, and They Have Decisively Acted Accordingly.

> The freedom to speak one's mind includes, in turn, the freedom to hold one's tongue. For the freedom "not to speak publicly" serves "the same ultimate end as freedom of speech in its affirmative aspect." The freedom to speak or not to speak includes, as well, the freedom to decline to mouth the messages of others. When government mandates "speech that a speaker would not otherwise" utter, it "necessarily alters content." The First Amendment thus protects

[5] Barbra Kay admitted at trial that she was a member of Queer Nation when applying to march in the Parade and that she was named in periodicals or newspapers as having called Cardinal O'Connor a homophobe. Tr. 92. "Kay herself made no secret of her association with Queer Nation." Yackle, *Parading Ourselves*, 73 B.U. L. REV. 791, 840 (1993). Respondent's Brief characterizes this concern of the Veterans as "suspicions that some members of GLIB were also members of ACT-UP and Queer Nation" (at 39). Parade official Thomas L. Lyons testified as to his concern about people from the protest at Holy Cross Cathedral in the South End participating in the Parade. Tr. 272. "In the summer of 1990, ACT-UP/Boston disrupted the ordination of several young priests at the Holy Cross Cathedral in the South End. The protestors staged a mock gay wedding, shouted vulgarities, and threw condoms at priests and their families." Yackle, *Parading Ourselves* at 838.

> citizens from being punished for failing to endorse an ideological cause for which they have no sympathy, and, accordingly, refusing to enhance "the relative voice" of "opponents."

Yackle, *Parading Ourselves* at 802-03.

The whole point of the Veterans' Parade is to celebrate St. Patrick's Day and the British withdrawal from Boston. Most of the time, the Veterans have had no problem with would-be participants in their Parade. A marching band of bagpipers requires little analysis.

On occasion, however, groups have participated bearing messages the Veterans judged inappropriate for their parade. When a local anti-busing group applied to march in the 1970s, the Veterans said no. J.A. A86. When an anti-abortion group applied to march in the late 1980s, the Veterans circumscribed their message. J.A. A92-93. When NORAID wanted to march, the Veterans also modified its message. J.A. A93. When the Ku Klux Klan applied to march in 1993, the Veterans said no. J.A. A92. When a truck with anti-gay signs tried to enter the 1993 Parade, the Veterans said no to them, too (J.A. A79, A91), even though the courts had forced the Veterans to include a message proclaiming homosexuality which the Veterans disagreed with.[6]

Incredibly, the Supreme Judicial Court found "no legal relevance of this fact to the findings of the judge or to the conclusion we reach." *Irish-American Gay*, 418 Mass. at 244 n.10, 636 N.E.2d at 1296 n.10. But these exclusions were clearly relevant

[6] Respondent's Brief makes much of the supposed state of mind of Petitioner Hurley in excluding GLIB (Resp. Br. 41-43), and attempts to wrap itself up in that subjective finding based on the credibility of Mr. Hurley. *Id.* at 43-45. But Mr. Hurley's testimony was that he was just one vote on the Veterans' Council (J.A. A93), and that the vote to exclude GLIB was unanimous. J.A. A86. In any case, the only discriminatory intent he manifested at trial was discrimination against GLIB's messages and values, and that is constitutionally protected for a private actor.

to the Veterans' expressive purpose, whether the Parade was open to the general public, whether the Veterans exercised control and selectivity over their Parade or were simply "conduits" for the general public, and whether they shaped the Parade's message. Further, the exclusion of the truck with anti-gay messages was clearly relevant to the issue of discrimination on the basis of sexual orientation, and the issue of "pretext,"[7] especially since the Veterans' exclusion of sexual themes was judged to be pretextual. Conveniently, when GLIB states in its Brief that "this purported criterion finds virtually all messages and identifications acceptable, except for GLIB's identifying banner, which is unerringly singled out for exclusion," (Resp. Br. 30), it overlooks the telling exclusion of the anti-gay truck from the Parade.

Like the state courts, the Respondent was apparently unimpressed by this consistent track record: "The occasional exercise of selective judgment does not, however, establish a pattern of selectivity that would seriously fortify the [Veterans] Council's argument here." Resp. Br. 33-34 n.24. The most obvious response is that the Veterans have exercised their rights as parade organizers to exclude groups and messages whenever necessary. Problems haven't arisen that often, so the Veterans haven't had to make many message-based exclusionary judgments.

Respondent's Brief also raises the specter of racial or religious discrimination if the Veterans' position were upheld (Resp. Br. 24, 29). However, the NAACP marched in the

[7] Judge Flannery was careful to note in his opinion that neither the Ku Klux Klan nor ROAR were protected under the public accommodation law. Cert. Pet. App. at B7. If the pro-gay sign must be included in the parade, what about the truck with the anti-gay sign? Arguably, of course, by making a "distinction" in a place of public accommodation on the basis of sexual orientation, it should be banned. But by that test, applied in a viewpoint-neutral and content-neutral way, as it must, GLIB's own sign makes such a "distinction." Section 98. Thus the overbreadth of the public accommodation statutes, as interpreted by the Massachusetts courts, is illustrated.

Parade in the 1960s (J.A. A102); and a Protestant Bible Trolley makes an annual appearance. Pet. Br. 14 n.5. Individuals are not discriminated against on the basis of race, sex, religion or sexual orientation in this Parade.[8] However, groups with messages of their own are subject to the approval of the parade organizers. The Veterans did not exclude the NAACP. It is doubtful, however, that they would have admitted the Black Panthers.

GLIB argues that "[p]resumably, the manager of Ollie's Barbeque [*sic*] had a point of view about serving African-Americans," citing *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). The manager of Ollie's Barbecue was not engaged in an expressive activity. He was engaged in the business of selling food. If the patron tried to get into the kitchen and add to the menu, or posted a sign on the front door without the proprietor's permission, or started making a speech once inside the restaurant, the analogy would be more apposite.

The sponsors of a parade have the right under the First Amendment to exclude any self-identifying group that it feels is not compatible with their parade, whether the identification is religious, ethnic, or anything else. If the Veterans wanted to exclude, for instance, a club such as the English Union or a group proclaiming that they are Japanese Buddhists, or Irish Pantheists, or the Aryan Worshippers of Odin, because the identification sends a message incompatible with their own theme or message, this would certainly be their right. And if a self-identifying banner also proclaims a life-style that is inconsistent with the sponsor's own themes, the First Amendment right to exclude should be obvious. People cannot constitutionally be compelled to provide a platform for messages they disagree with.

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[8] In this regard, it should be noted that openly gay city councilor David Scondras had marched in the Parade. Tr. 33. Yackle, *Parading Ourselves* at 836 n.208.

IV. The Statute As Interpreted, and the Injunction Applying It, Directly Burden Speech.

Once a statute or regulation targeted at discrimination in a place of public accommodation is applied to a parade organized by private sponsors, the First Amendment is necessarily and directly implicated. Of course, all types of protected speech could be curtailed on the streets under the the pretext of protecting some public good or advancing some public interest, and for this reason such attempts have been regularly struck down. *See Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969); *Cox* v. *Louisiana*, 379 U.S. 536, 554-57 (1965); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor of Thurmont*, 700 F. Supp. 281, 286-87 (D. Md. 1988); *Collin* v. *Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978); *Forsyth County* v. *Nationalist Movement*, 112 S. Ct. 2395 (1992).

Strict scrutiny obviously applies because this case involves the Veterans' speech, as well as their right to be free from compelled speech. Because the trial court equated messages and values with sexual orientation, and the Supreme Judicial Court affirmed that equation, the public accommodation law now prohibits discrimination on the basis of message in a privately organized, privately financed, permitted parade. As such, the public accommodation law triggers strict scrutiny. The injunction, in requiring that the Veterans not exclude GLIB from marching in the parade on the basis of sexual orientation under the usual terms and conditions, meant beyond cavil that GLIB's messages were to be included, given that the trial court equated sexual orientation with GLIB's messages and values. If the celebration or proclamation of homosexuality is deemed by parade organizers to be inconsistent with the organizers' traditional religious and social beliefs, then a law compelling the parade organizers to include this message as part of their expression must be subject to strict scrutiny. Moreover, such compelled speech has been found by this court to be unconstitu-

tional. *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980); *Pacific Gas and Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 12 (1986) ("*PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.")

It would be ironic if those expressing hate messages had their day on the streets, but those celebrating and affirming their traditional religious and social values were excluded, or worse, subjected to a governmental system that required them to explain, justify, or rationalize their beliefs to a doubtful, suspicious, sarcastic, or oppressive authority — whether that authority came in the form of the courts, or from a licensing authority.[9]

Unfortunately, in the Veterans' case, their desire to run a traditional parade conflicted with the political agenda of others who saw in the parade an opportunity to advance their own cause on the streets of South Boston. The strategic importance of the political statement was best summarized by Professor Yackle. "The parade," Prof. Yackle wrote, "plainly reflects

[9] This is what at least one of the co-signers of the Respondent's brief has suggested: "I will urge city officials in New York and Boston to take responsibility for planning and conducting these two great street parties and, in so doing, to ensure both that all members of the community may attend and that anyone who wishes by attending to express a message is free to do so. Concomitantly, city authorities should weed discriminatory features out of their existing schemes for dispensing permits for privately sponsored parades. Such permits should be freely distributed to competing groups, whose messages should be considered only to promote expression. Officials should try to accommodate a group's special interest in a particular street or date, but should not be obliged routinely to turn major arteries over to private processions. When the precise character of a message warrants it, city officials should exempt a parade from the local anti-discrimination ordinance. If a group seeks such a dispensation, it should be invited to explain how its compliance with the anti-discrimination law would dilute its message, and city officials should make that explanation known to the public. As a general matter, then, city officials should take parade cases as they come — attempting to be genuinely neutral with respect to permit applicants, but recognizing that the proper result in a case often requires an investigation of the facts and hard judgment. Suffice it to say, I think the Constitution should be read to endorse this practical approach." *Yackle*, *supra* at 796.

the larger social and political developments currently under way and must be seen in that overarching context along with other related flashpoints — gays and lesbians in the military, same sex marriages, dependent benefits for gay partners — and dozens of others."

This case presents a viewpoint discrimination problem similar to that in *R.A.V.* v. *City of St. Paul*, 112 S.Ct. 2538 (1992).

> Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But [other words] would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents . . . [The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

Id. at 2547-49. Interestingly enough, one of GLIB's amici argues that "a gay and lesbian pride parade may exclude those bringing a message of antipathy towards lesbians and gay men," because "their participation would conflict with the expressive purpose of the parade."[10] Anti-Defamation League Br. 11. Respondent argues that, "[b]y its own submissions, the Council has not had, and does not have, an 'anti-gay' message to convey" (Resp. Br. 34 n. 25), and thus cannot justify GLIB's exclusion on that basis. In other words, if the Veterans' Parade were truly hateful towards gays and lesbians, they could then exclude GLIB. That First Amendment protection should depend upon being hateful as opposed to remaining silent, all under the

[10] Cathleen Finn, a member and spokesperson of GLIB who testified at trial, stated that "if a group was not going to participate in the spirit of gay pride and in the gay pride parade, they shouldn't be allowed to participate." Tr. 134.

pretext of vindicating anti-discrimination law, is truly mind-boggling. The rule GLIB proposes is, in effect, you cannot discriminate against gay pride messages unless you are really hateful. In any case, the public accommodation law cannot be allowed to trump the First Amendment.

In sum, GLIB's position invites continual litigation about every privately-sponsored parade. Professor Yackle has written that "extant constitutional doctrine does not generate a clear answer, but only beckons a difficult exercise in balancing — in every case and in every year." Yackle, *Parading Ourselves* at 868. Without a reversal of the lower courts' decisions in this case, the Veterans' Council will be compelled to either 1) silence its voice, as in 1994; 2) conduct future Parades with the governmentally enforced inclusion of a message and viewpoint favored by the state, as in 1992 and 1993; or 3)submit its claim that it has reformulated the Parade into a protected expression to a judge for his or her approval, as in 1995. Based on the record in this case, the Petitioners ask for a resounding and categorical First Amendment ruling that will protect privately organized parades from governmental control of content.

> A parade "falls within the sphere of conduct protected by the First Amendment." Indeed, one can scarcely imagine a more definitive and graphic way for a citizen to manifest himself to the world than to march down the street, arm-in-arm with friends and neighbors, displaying his allegiances for all to see. To abandon the anonymity of the crowd and take a place in the lists is to affirm as few other actions can the ideas and people one calls her own. To parade is to proclaim who, what, and of what you are — to identify yourself with a community of thought and comradeship in the most elemental sense.

Yackle, *Parading Ourselves* at 797.

Conclusion

For these reasons and those stated in our opening brief, the judgments and orders of the Massachusetts Supreme Judicial Court and the Superior Court should be reversed and vacated.[11]

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[11] Contrary to Respondent's assertion that the Massachusts courts "got it right," (Resp. Br. 48), and that their judgment should be affirmed, Petitioners list some of the more egregious errors in these decisions:

A. Dismissing the Veterans' stated expressive purpose of celebrating their religious and social values.

B. Equating a message with people's sexual orientation.

C. Ruling that a private event cannot exclude sexual themes, and that it is discrimination under the statute to do so.

D. Attributing the unanimous decision of the Veterans' 60-man Council to exclude GLIB solely to John Hurley, and imputing Hurley's alleged discriminatory intent to the whole Council.

E. Ruling that an expressive event, such as a parade, had to be sufficiently focused to get First Amendment protection.

F. Determining that the fact that the Veterans had excluded other groups and messages from their Parade in the past was irrelevant.

G. Declaring that one has the burden of first proving a First Amendment right in order to be protected from the forced showcasing of another's unwanted message.

H. Classifying an expressive event as an association, and applying the criteria of membership organizations to a parade.

I. Stating that the Parade "simply has not been [a protected First Amendment activity] *in the past* and is not one now" (emphasis added) when the court had no significant record of the 45 other parades the Veterans ran prior to 1992. Cert. Pet. App. at B25 n.27.